

Service Date: March 6, 1991

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

SILVERBOW OWNERS ASSOCIATION, a)	
Non-profit Condominium Association)	
of the State of Montana,)	UTILITY DIVISION
)	
Complainant,)	
)	DOCKET NO. 89.3.5
vs.)	
)	
LONE MOUNTAIN SPRINGS, INC.,)	ORDER NO. 5493a
)	
Defendant.)	

PROPOSED ORDER

APPEARANCES

FOR THE COMPLAINANT:

James J. Screnar, Esq., Screnar, Guenther & Zimmer, P.O. Box 1330, Bozeman,
Montana 59771-1330

FOR THE DEFENDANT:

Thomas R. Anacker, Esq., Kirwan & Barrett, P.O. Box 1348, Bozeman, Montana
59771-1348

FOR THE COMMISSION:

Timothy N. Sweeney, Staff Attorney, 2701 Prospect Avenue, Helena, Montana
59620-2601

BEFORE:

JOHN B. DRISCOLL, Commissioner & Hearing Examiner

BACKGROUND

On March 24, 1989 Silverbow Owners Association (Complainant or SOA), a non-profit condominium association, filed the instant complaint against Lone Mountain Springs, Inc. (Defendant or LMS), a privately-owned water utility. The complaint alleged that LMS was financially responsible for repairs to certain water service pipelines located within the boundaries of the Silverbow I and Silverbow II condominium complexes; that LMS is currently providing inadequate water service and facilities to the residents of Silverbow I and II due to leaks still existing in these same pipelines; and that LMS is responsible for making all necessary repairs to these pipelines.

On April 26, 1989 Defendant filed its answer and counterclaim. Defendant admitted therein that leaks existed in the water service pipelines located within the boundaries of Complainant's real property. Also, Defendant affirmatively alleged that it had made repairs to said pipelines.

On August 29, 1990 this Commission denied Defendant's motion to dismiss for failure to state a cause of action. The Commission determined that though the parties were essentially requesting a declaratory ruling on the application of Section 69-4-511, MCA, to condominium complexes, sufficient facts had been pled to maintain a complaint based on inadequate service and/or facilities. See Order Denying Defendant's Motion To Dismiss For Failure To State A Cause Of Action, p. 3 (Order No. 5493).

On October 11, 1990 this matter came before the Commission for a properly noticed hearing. At the close of the hearing, and pursuant to a motion made by Defendant, Commissioner Driscoll directed both parties to put before the Commission briefs containing proposed findings of fact and conclusions of law. Said briefs were to be submitted no later than November 30, 1990.

On November 30, 1990 the parties filed a stipulated motion for an extension of time. The Commission subsequently approved an extension of time for the filing of post-hearing briefs to January 10, 1991.

On January 10, 1991 the Commission received the Complainant's brief containing proposed findings of fact and conclusions of law. No brief was submitted by Defendant.

SUMMARY OF TESTIMONY

For the Complainant

Ira Sumner, a resident of the Silverbow complex and a member of SOA's board of directors, testified that in late 1987 the board was notified by the Defendant that bad water leaks existed within the complex. He further testified as to subsequent meetings with Lone Mountain Springs officials during which it was agreed that Defendant would make the necessary repairs with the issue of financial responsibility to be decided later. Testimony was also provided concerning water shortages and rationing at the Silverbow complexes and instances where the water was turned off. Mr. Sumner testified that he had personally experienced such occurrences.

Jerry Pape, a resident of the Silverbow complex and the chairman of SOA's board of directors, testified as to discussions and meetings with the president of LMS regarding leaks within the water service lines, the manner in which Silverbow residents are billed for LMS's water service, and LMS's prior repair of water service lines within the complex's boundaries.

Don Langohr, a resident of the Silverbow complex and a member of SOA's board of directors, testified as to the aforementioned meetings with LMS regarding financial responsibility for repairs.

For the Defendant

John Kircher, President of Lone Mountain Springs, testified as to meetings in 1987 and 1988 with representatives of SOA regarding leaks located within the Silverbow property boundaries, and that those meetings resulted in LMS agreeing to proceed with certain repairs with the issue of financial responsibility to be determined at a later date. In regard to the level of service provided the Silverbow complexes, Mr. Kircher testified that

in his opinion such service was reasonably adequate. He also testified that despite diligent efforts to the contrary, malfunctions in telemetry equipment have sometimes resulted in the complete draining of the water tank supplying the Silverbow complex.

Raymond J. Tout, Operator of the LMS Water System, testified as to the physical arrangement of the various systems that comprise the LMS water system. Mr. Tout also testified that the water lines within the Silverbow complexes were service lines, and he defined service lines as lines that take off from a main and service a particular area. He also interpreted leak detection reports and testified that the leak detection study performed in September 1990 indicated that all the the leaks were in the three inch pipes within the Silverbow complexes. Mr. Tout estimated that these leaks currently account for approximately 100,000 gallons per day.

Jack Schunke, a civil engineer for Morrison-Maierle/ CSSA, testified as to the character of the various lines servicing the Silverbow complexes.

Gary Sturm, senior project manager with Morrison-Maierle/CSSA, testified as to Morrison-Maierle's preparation of an appraisal of the LMS's water system and its relevance to LMS's 1980 rate-increase application.

William Guza, a certified public accountant with Veltkamp, Stannebein and Bateson, P.C., testified as to the depreciation schedule for LMS asset base.

DISCUSSION

I. INTRODUCTION.

Two questions are currently before this Commission: 1) Which party is responsible for the repair and maintenance of those pipes contained within the boundaries of the Silverbow complexes; and 2) Whether the service and facilities provided to the Silverbow complexes are adequate? The answer to this second inquiry is, of course, dependant on an antecedent finding as to what services and facilities are in fact being provided by the Defendant. In this regard, our analysis begins with ownership and financial responsibility for the subject-matter pipelines.

II. OWNERSHIP AND RESPONSIBILITY.

Both parties have expended considerable energy arguing the application of Section 69-4-511, MCA, to condominium developments. Section 69-4-511(1), MCA, provides:

A property owner is responsible for the costs of constructing privately supplied water service pipelines from the main to his premises and for maintaining service pipelines from his property line to his premises. The private water service provider is responsible for the cost of maintaining water service pipelines from the main to the owner's property line, except that the property owner shall pay for pipe and other supplies used in maintaining water service lines between the main and his property line.

As Defendant correctly argues, Section 69-4-511, MCA, does not distinguish between condominium unit owners and homeowners. Indeed, this section merely governs the relationship between a property owner and a private water utility vis-a-vis construction and maintenance of water service lines. This relationship is not complicated. The property owners is financially responsible for: 1) The construction of water service pipelines from the main to her premises; 2) the maintenance of those lines running from her property line to her premises; and 3) the pipe and other supplies used in maintaining the water service lines between the main and her property. The private water utility, on the other hand, is financially responsible for the maintenance of the water service lines between the main and the property line.

The simplicity of this statutory relationship should, in most cases, make proceedings such as this one unnecessary. However, as will be discussed *infra*, the facts of this case do not permit such simplicity because: 1) The proper application of Section 69-4-511, MCA, is dependent on customer construction and ownership of the water service pipelines; and 2) the parties here dispute ownership of the water service pipelines.

A. SECTION 69-4-511, MCA.

Prior to the passage of Section 69-4-511, MCA, a property owner was responsible for the construction and maintenance of the water service lines running from the main to her premises. As evidenced by the well-chronicled experiences of Senator J.D. Lynch, this arrangement presented certain logistical difficulties when it came to customer maintenance of water service pipelines located under streets and other public property. Section 69-4-511, MCA, was subsequently enacted in response to these difficulties. See Mountain Water Co. v. Montana Department of Public Service Regulation, 919 F.2d 593 (9th Cir. 1990) (accepting the district court's finding that the purpose of the statute is to help assure proper maintenance of customer-owned service lines).

This legislative response affected the previous relationship in basically one way: The private water utility was now financially responsible for maintenance of those customer-owned pipelines that were located beyond the customer's real property; and, since customers still owned these pipelines, they remained financially responsible for the cost of materials and supplies.

The logic of Section 69-4-511, MCA, is fairly obvious when one considers that the Legislature intended to shift a portion of the oftentimes prohibitive cost of maintenance, including potential liability, from the individual customer to the entire customer base. Of course, the private water utility was the proper conduit for this shifting of costs since the financial burden allocated by Section 69-4-511, MCA, could be recovered and spread over the customer base through the imposition of higher rates.

This redistribution of costs aspect of 69-4-511, MCA, is crucial to understanding its limited application to customer-owned water service pipelines. For example, assume the private water utility owned the water service pipeline running from the main to the customer's premises. To read Section 69-4-511, MCA, as requiring customers to undertake the financial responsibility for the repair and maintenance of utility-owned pipelines would result in an uncompensated taking of a customer's property since a customer would not be able recover the costs of maintaining a utility's plant. The Commission cannot adopt such a reading since it would be in contradiction to the fundamental rule of statutory construction that a statute must be construed in a reasonable manner so as to avoid unreasonable results. Darby Spar Limited. v. Department of Revenue, 217 Mont. 376, 705 P.2d 111 (1985).

The Commission therefore finds that Section 69-4-511, MCA, is intended to allocate financial responsibility for repair and maintenance of customer-owned water service pipelines as between a customer and a private water utility.

B. OWNERSHIP OF 3-INCH PIPELINES.

At hearing and in its Proposed Findings of Fact and Conclusions of Law, Complainant alleges that Defendant is the owner of the 3-inch pipelines at issue. This contention is based primarily on the fact that these same pipelines are contained in the LMS annual reports filed with this Commission. The Commission finds this contention persuasive.

Section 69-3-203, MCA, requires all public utilities to file an annual report with the Commission no later than two and one-half months after the close of accounts. LMS has failed to file annual reports for the last two years, and the last annual report filed by LMS was for the year ending December 31, 1987. That problem aside, Table XVII of the 1987 report, titled Distribution Mains, LMS reports 2,331 feet of 3-inch distribution mains. According to the testimony of Ray Tout, the leaks at issue in this case are located in the 3-inch pipes and that all the 3-inch lines are located within the Silverbow complexes.

The 1987 Annual Report combined with Mr. Tout's testimony would seem to suggest that LMS has a problem with its 3-inch pipelines. However, LMS contends that the annual reports submitted to the Commission are for reporting purposes and are not indicative of ownership. LMS further maintains that though these 3-inch pipelines appear in a number of its annual reports, SOA is the owner in fact. The facts do not support this contention.

At hearing and in its pleadings, LMS acknowledged previous ownership of the 3-inch lines, but alleged that such ownership was terminated by order of this Commission in a 1980 rate increase proceeding (Docket No. 6689, Order No. 4619). According to LMS, the Commission's reduction of the proposed cost valuation of the water plant by \$252,600, for customer contributions in aid of construction, was determinative of ownership.

LMS's contention here suffers on three fronts. First, though LMS represented a reduction of \$252,600, the Commission approved a reduction for contributions in aid of construction of only \$125,534. This amount was reached using a proportional reduction factor of .497, based on the proportional difference between LMS's original cost figure (\$1,755,645) and that found by the Commission (\$872,500). In other words, the reduction was not linked to contributions for specific assets such as 3-inch pipelines.

Second, the Commission made no specific determination regarding ownership. The fact that specific assets were not used to compute the \$125,534 figure logically precludes such a determination.

Finally, and most importantly, reductions for customer contributions in aid of construction are not used to affect ownership. Such reductions implicitly assume a utility's ownership of the whole plant and are used by this Commission to determine the cost of plant on which the utility is entitled to earn a rate of return. In other words, the cost of a utility's plant would not be reduced if ownership were vested with the customer. Further, customer contributions in aid of construction are a onetime cost of service paid by a prospective subscriber, and are used to construct common-use plant owned by the utility. For these reasons, the Commission finds that LMS's ownership was clearly unaffected by Order No. 4619.

And, while Defendant correctly pointed out that SOA never granted an easement for the pipelines, this lack of an easement by itself cannot contradict the finding of ownership created by the admitted previous ownership and the continued listing of the 3-inch pipelines in LMS's annual report. In this regard, the Commission would note that if LMS lacks the necessary easement, it is LMS's obligation to either obtain the easement from Complainant or institute an eminent domain proceeding.

In determining the evidentiary weight that should be accorded an annual report, the Commission acknowledges the testimony of Defendant's witness, Gary Sturm, who maintained that annual reports are not reliable indicators of ownership. While Mr. Sturm's point is well taken, the fact remains that LMS was otherwise unable to establish a legal transfer of ownership. Though not conclusive of ownership, the 1987 annual report is evidence that LMS's initial ownership, which is undisputed, never ceased.

Therefore, the Commission finds that Defendant is the owner of the water service pipelines extending from the main to the service lines connecting the individual units within the Silverbow complexes. And, since Section 69-4-511, MCA, is clearly inapplicable to utility-owned pipelines, the Commission further finds that Defendant is financially responsible for any past, present or future repairs and maintenance to these water service pipelines.

III. ADEQUATE SERVICES AND FACILITIES.

Section 69-3-201, MCA, requires every public utility to provide reasonably adequate service and facilities. The testimony presented by witnesses for both sides leaves no doubt that the service and facilities currently provided to the Silverbow complexes are inadequate.

Ray Tout, the person in charge of operating Defendant's water plant estimated that 100,000 gallons of water per day are currently being leaked from the system. In addition, there is uncontroverted testimony from both parties concerning loss of service, water shortages and rationing.

The definition of reasonably adequate service and facilities may be elusive, but this Commission interprets the phrase as an objective standard, requiring that level of service or facilities that a customer would ordinarily expect to be provided. Obviously, if there is a loss of service and shortages of water, neither being caused by forces outside the control of the utility, then the utility has failed to provide reasonably adequate service and facilities. Therefore, the Commission finds that the service and facilities provided by LMS to the Silverbow complexes is inadequate.

CONCLUSIONS OF LAW

Based on all of the foregoing, the Commission reaches the following conclusions of law:

1) Section 69-4-511, MCA, is inapplicable to the facts of this case since Defendant is the owner of the at issue 3-inch water service pipelines.

2) By virtue of the leaks in these 3-inch pipelines and the resulting loss of service, shortages and rationing, Defendant is in violation of Section 69-3-201, MCA, which requires that every public utility furnish reasonably adequate service.

3) Defendant's failure to file a annual reports for the years 1988 and 1989 is a violation of Section 69-3-203, MCA.

ORDER

THEREFORE, Pursuant to the authority granted by Sections 69-3-102 and 69-3-330, MCA, Defendant is hereby ordered to:

1. Repair or replace those sections of the 3-inch water service pipelines that are currently leaking by June 30, 1991.

2. To make all other necessary repairs to the water plant as to insure the provision of reasonably adequate service and facilities to the residents of the Silverbow condominium complexes.

3. To file complete and accurate annual reports for the years 1988 and 1989 by April 15, 1991.

Done and Dated this 5th day of March, 1991.

JOHN B. DRISCOLL, Commissioner

& Hearing Examiner

ATTEST:

Ann Peck
Commission Secretary

(SEAL)

NOTE: This Proposed Order is a proposal for decision. Each party has the opportunity to file exceptions, present briefs, and have oral argument before the PSC prior to Final Order. See, Section 2-4-621, MCA. Exceptions and briefs must be filed within 20 days of the service date of this Proposed Order. Briefs opposing exceptions must be filed within 10 days thereafter. Oral argument, if requested, must be requested at or prior to the time of briefing. See, ARM 38.2.4803 and 38.2.4804.